LEE FOOK SAM v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) February 2, 1962]

[K.L. — F. M. Criminal Appeal No. 40 of 1961]

Penal Code, ss. 34 & 302 — Murder—Common intention—Evidence showing each of the intruders knew that some of the others were armed—Direction to jury—Whether adequate.

Criminal Procedure—Defence counsel—Engagement of, in succession—Withdrawal of instructions—Refusal of adjournment—Whether conduct of defence prejudiced.

On August 6, 1961 four persons, three of whom were armed with firearms, entered the house of one Foo. When the said Foo came on the scene at least two shots were fired at him and he fell down dead. The intruders were pursued and later in a hut nearby the appellant was arrested by the police who also found an unfired revolver concealed under a platform. One W was also arrested and together they were charged and tried for murder committed in furtherance of a common intention. W was acquitted at the trial.

The appellant at the trial changed his counsel three times and on the fourth occasion when he asked for an adjournment to engage someone else, this was refused. The trial judge directed the jury on the point of common intention more than once in these and similar words: "If you are satisfied that the prosecution have to your satisfaction proved all of the ingredients which I have set out to you, namely, that the 1st accused was there as a member of the gang, took part in the affairs of the gang, that the man who fired the shot intended to murder or to kill Foo and that Foo was killed in furtherance of that common intention, then it is your clear duty to say he is guilty as charged." The appellant's defence was one of alibi; he was convicted. On appeal,

Held: (1) the request for the adjournment was unreasonable and properly rejected;

(2) the judge's direction to the jury was suitable and adequate to ensure that the jury applied their minds to the circumstances of the case.

Cases referred to:—

(1) *Mahbub Shah* v. *King Emperor* 72 I.A. 148, 153; A.I.R. 1945 P.C. 118.

(2) *Barendra Kumar Ghosh* v. *The King Emperor* 52 I.A. 40.

COURT OF APPEAL (CRIMINAL).

L. P. Thean for the appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for the respondent.

Thomson C.J.: This appellant and a man named Robert Wong Hor Choon were tried at Ipoh for murder in contravention of section 302 of the Penal Code. Wong was acquitted but the appellant was convicted and sentenced to death. He appealed against his conviction and we dismissed his appeal on 15th January, 1962. We intimated that we would state our reasons at a later stage.

The charge against the appellant and Wong on which the appellant was convicted was as follows:—

"That you on or about the 6th day of August, 1961, at No. 31, Jalan Lim Seng Chew, New Town, Ipoh, in the State of Perak, in furtherance of the common intention of you both did commit murder by causing the death of Foo Yet Kai, and by reason of section 34 of the Penal Code committed an offence punishable under section 302 of the said Code."

It was the prosecution case that in the early morning of 6th August, 1961, four persons, three of whom were armed with firearms, entered the house of one Foo Yet Kai, a wealthy man residing in a middle-class suburb of Ipoh. They entered the premises by a back door which was opened with some sort of a master key. The intruders seized and tied up two maid servants who were on the premises and Foo's son and nephew. These people were pushed into rooms but one of them heard one of the intruders demanding a large sum of money. Just then Foo himself came on the scene and came down a staircase at the top of which were one or more intruders when at least two shots were fired and he fell down dead. Further shots were fired and the intruders left the house pursued by Foo's out-door servants. One of them, said to be the appellant, fell while jumping the wall at the back of the house and hurt his leg. One of his companions assisted him and he was followed to a hut in the compound of a neighbouring school. Later, a police officer entered the hut and found the appellant there and some time later concealed under a platform the police found a revolver which had not been recently fired.

There was nothing to show which of the intruders fired the shots which killed Foo and it was conceded by the prosecution that in view of the condition of the revolver found in proximity to the appellant it was highly probable that it was not he who fired the shots. There was, however, evidence which, if it was believed, showed that each of the intruders knew as a fact that some of the others were armed.

The appellant's defence, which was not given on oath, was one of alibi. He said that he had come from Malacca and that a girl friend of his had made an appointment to meet him at a cinema in Ipoh on the evening of 5th August. While he was waiting for her he was accosted by two persons whom he described as "ruffians". One of them struck him; he ran away and was chased. He ultimately shook off his pursuers and after wandering about for a long time in the darkness found his way to the hut in which he was later arrested. He made no effort to support this story by calling the lady whom he had arranged to meet.

On all that the case was put to the jury by the prosecution as one where each of the four men who entered Foo's house was guilty of murder by reason of the provisions of section 34 of the Penal Code and that the appellant and

Wong were two of these persons. As has been said the jury found the appellant guilty.

The first ground of appeal was based on an incident which happened at the trial. It would appear that at some stage subsequent to his arrest the appellant engaged the services of two very distinguished counsel in succession. It is not necessary to mention their names but the fact that they were engaged shows there was no question of any lack of funds. They withdrew from the case and, as the appellant did not engage other counsel in their place and as the case was a capital one, he was assigned junior counsel by the court. At the commencement of the trial some days later the appellant for the first time expressed dissatisfaction with the counsel who had been assigned to him, and said he wished to engage another. He was accordingly granted an adjournment for fourteen days during which he or his wife engaged experienced senior and junior counsel who appeared at the adjourned trial. On the morning of the third day of the trial senior counsel informed the court that the appellant had withdrawn his instructions from both counsel. The appellant himself confirmed this and asked for an opportunity to engage yet other counsel. He said he was not prepared to accept the counsel who had previously been assigned to him by the court, and who had received instructions, and asked for an adjournment to obtain someone else. This was refused and it was urged upon us that the appellant was thereby unduly prejudiced in the conduct of his defence.

In our view this ground of complaint was without substance. When the incident occurred the trial was entering on its third day and all the prosecution evidence had been called except the medical evidence which was not of a controversial character. Again Wong, who was ultimately acquitted, was represented by counsel, and although the substantive defence of both prisoners was of alibi, and their alibis were different, yet the second line of defence of both prisoners was the same, that is to say (I will be discussing it shortly) that no common intention was proved. No reason of any sort was given by the appellant for withdrawing his instructions from counsel. He said that they had been selected not by him but his wife, yet the fact remains that for two days he had allowed them to conduct his defence without protest. In all the circumstances, we consider that his request for an adjournment was unreasonable and was properly rejected. What is more important, we are unable to see that he was in any way prejudiced and indeed the judge was at pains to put to the jury not only his defence of alibi, which clearly had very little prospect of success, but also as will be seen shortly, the defence for which his counsel had clearly been laying the foundations during the first two days of the trial, that is that the prosecution had not proved all the ingredients of the offence charged.

In the second place, it was said that the trial judge did not give the jury an adequate direction on the law of common intention.

It was the case for the prosecution that murder was to be attributed to each of the four persons who entered Foo's house irrespective of which of them fired the fatal shot by reason of section 34 of the Penal Code which reads as follows:—

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

There was at one time considerable controversy in the Indian courts as to the effect of that section. The controversy, however, has now long been settled and, in the case of *Mahbub Shah* v. *King Emperor*,[1] the effect of the section was thus described:—

> "To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

In an earlier case (*Barendra Kumar Ghosh* v. *The King Emperor* [2]) their Lordships were concerned with a case where three men entered a post office where the post-master was counting his money. They all fired shots at him with pistols and he was killed but it was not clear which of them fired the fatal shot. At the trial the judge charged the jury in the following terms:—

> "....in this case if these three persons went to that place with a common intention to rob the postmaster and, if necessary, to kill him and if death resulted, each of them is liable, whichever of the three fired the fatal shot. If you come to the conclusion that these three or four persons came in to the post office with that intention, to rob and if necessary to kill, and death resulted from their act, if that be so, you are bound to find a verdict of guilty. I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty."

Their Lordships said that that direction "was not erroneous in point of law."

In the present case the trial judge dealt with the point more than once.

He said that the prosecution had to prove five things before there could be a conviction. They had to prove that Foo was dead; they had to prove that he died as a result of being shot; they had to prove that he was shot by a member of the gang who entered his house and that that man when he fired the gun had the intention to kill or so forth; they had to prove that each of the accused was a member of the gang and then he went on:—

"Fifthly, they have to prove, since neither of the accused fired the shot....each of them had the common intention with the man who did fire the shot either to kill or the common intention with that man to commit another offence at all cost and with the knowledge that the other members were armed with firearms which they intended to use, if necessary. And then they have got to prove to your satisfaction as part of that common intention that each of these accused and the man who fired the shot did some act in furtherance of that common intention, and not distinct from or separate from."

At the very end he returned to the point when he was telling the jury what verdicts were open to them. In the first place he said:—

"If the prosecution evidence has not satisfied you that the first accused was there and that he had with others including the man who fired the shot the common intention to murder or the common intention to commit an offence and to go to the extent of killing, if necessary, then your verdict against him would be not guilty."

A little later he said this:—

"If you are satisfied that the prosecution have to your satisfaction proved all of the ingredients which I have set out to you, namely, that the 1st accused was there as a member of the gang, took part in the affairs of the gang, that the man who fired the shot intended to murder or to kill Foo and that Foo was killed in furtherance of that common intention, then it is your clear duty to say he is guilty as charged."

In our view these passages were suitable and adequate to ensure that the jury applied their minds to the particular circumstances of the case in the light of the law as stated in the case of *Mahbub Shah* v. *King Emperor, supra.*

Finally the judge's summing-up was attacked on a number of grounds of detail. In our view these complaints were not justified and amounted to no more than that the summing-up was not as favourable to the appellant as it might have been.

In our view the summing-up was both adequate and accurate.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

RE TAN TYE DECD.; TAN LIAN CHYE & ORS. v. ESTATE & TRUST AGENCIES (1927) LTD.

[O.C.J. (Chua J.) August 20, 1963]

[Singapore — Suit No. 1559 of 1960]

Trust and Trustees—Breaches of trust—Omission of trustees to properly invest trust funds—Loss to the trust which otherwise would not have occurred.

Trust and Trustees—Wilful neglect or default—Failure to take out money deposited in court and investing same in trustee securities—What constitutes wilful neglect or default—When onus on trustees to show no wilful neglect or default.

Trust and Trustees—Duty to invest—Prompt investing necessary—Beneficiaries may be consulted but trustee must exercise own discretion—Discretion not to be surrendered to beneficiaries—Money in hands of trustees—Whether money lying in court in hands of trustees—Whether money in hands of Accountant-General is investment in trustee securities.

Trust and Trustees—Relief for breach of trust—Trustees Ordinance (Cap.34), s.60.

The defendants were at all material times the trustees of the will of Tan Tye deceased. In 1953 the Government of Singapore acquired two pieces of land forming part of the trust property and paid compensation therefor the sums of $103,231.18 and $103,050.00 respectively into court. Notices of these payments were duly received by the defendants in May 1953. These sums were withdrawn by the defendants only in November 1957 and December 1959 respectively. The plaintiffs, some of the beneficiaries under the will of the testator, alleged that in failing to withdraw the two sums of money from the court promptly and invest them in trustee securities the defendants were guilty of breaches of trust and also of wilful neglect and default. The defendants maintained that (i) under the will of the testator the moneys could only be invested in land or houses in Singapore and that they had after consultation with the plaintiffs decided to wait as the price of immovable property was too high; (ii) litigation was pending with one or more suits in connection with the estate which may involve the possibility of capital expenditure by them out of trust funds; (iii) moneys with the Accountant-General were not moneys in their hands and as such they could not invest same and that they should only be chargeable for moneys actually received by them under section 32(1) of the Trustees Ordinance; (iv) the two sums of money have already been invested by the Accountant-General in trustee securities and that therefore there were no breaches of trust by the defendants; (v) that even if there were breaches of trust they were relieved by section 60 of the Trustees Ordinance. Further with respect to the second sum of $103,050 paid into court the defendants stated that the delay was due to the fact that (a) the property acquired was not vested in them by the order of court and (b) they could not satisfy the court that the testator's estate was entitled to the compensation money.

Held: (1) the defendants should have drawn out the money from the court as soon as it was convenient and should have invested it in trustee securities. Although the trustees may inquire as to the wishes and opinions of beneficiaries, they must always exercise their own judgment and not surrender it to any of the beneficiaries. The defendants therefore committed a breach of trust in failing to draw out and invest the money in court within a reasonable time;

(2) there was no evidence to show that the defendants have been guilty of "wilful neglect or default";